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## Confession of Error by the Solicitor General

It is the responsibility of the Solicitor General to conduct and supervise "all aspects of Government litigation in the Supreme Court . . . ."<sup>1</sup> Occasionally, in representing the United States as the respondent, the Solicitor General will concede that error was committed in the lower court<sup>2</sup> and will join with the petitioner in requesting certiorari<sup>3</sup>—a practice commonly known as the confession of error. In addition to acknowledging error in such cases, the Solicitor General often recommends an appropriate disposition (usually summary reversal<sup>4</sup> with remand) to the Court.<sup>5</sup>

The Court considers whether corrective disposition is warranted only after it has exercised its certiorari jurisdiction pursuant to Supreme Court Rule 19.<sup>6</sup> Rule 19 is applied in all cases, including

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1. 1974 ATTY. GEN. ANN. REP. 26. The statutory duties of the Solicitor General are set out in 28 U.S.C. § 518(a) (1970): "Except when the Attorney General in a particular case directs otherwise, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested." See Fahy, *The Office of the Solicitor General*, 28 A.B.A.J. 20 (1942); Werdegarr, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 GEO. WASH. L. REV. 481 (1968).

2. It is not unreasonable for the Government to reverse its position on petition to the Court since the Solicitor General does not generally participate in the litigation of the case below, and it is unlikely that the case has come to his attention before the petition arises. See Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A.J. 229, 230 (1955); Stern, *The Solicitor General's Office and Administrative Agency Litigation*, 46 A.B.A.J. 154, 157-58 (1960); Stern, *Inconsistency in Government Litigation*, 64 HARV. L. REV. 759, 761-62 (1951).

3. See Sobeloff, *The Law Business of the United States*, 34 ORE. L. REV. 145, 149 (1955). Confession of error normally occurs in response to a petition for writ of certiorari from a criminal conviction below. Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1468 (1969). For examples of such confessions, see Hayles v. United States, 419 U.S. 892 (1974); Howard v. United States, 356 U.S. 25 (1958); Simpson v. United States, 355 U.S. 7 (1957). The Solicitor General could confess error in cases that would normally be considered by the Court under its appellate jurisdiction, by joining in the jurisdictional statement of the appellant. However, this writer has found no such cases, and therefore this Note considers confessions of error only in the context of the Court's certiorari jurisdiction.

4. See, e.g., Watts v. United States, 422 U.S. 1032 (1975) (reverse and remand with leave given to the prosecution to dismiss charges); Hayles v. United States, 419 U.S. 892 (1974) (reverse and remand with leave given to the prosecution to dismiss charges). On occasion, the Solicitor General has requested reversal without remand. See, e.g., Simpson v. United States, 355 U.S. 7 (1957) (per curiam reversal).

5. See, e.g., Dusky v. United States, 362 U.S. 402 (1960); Young v. United States, 315 U.S. 257 (1942). The Solicitor General has been known not to give any indication of what disposition he desires. See Note, *supra* note 3, at 1468.

6. "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." U.S. SUP. CT. R. 19(1). Under rule 19, between 85 and 95 per cent of

those where error has been confessed, and requires that there be "special and important reasons" for the Court to grant a petition for certiorari.<sup>7</sup> Reasons deemed "special and important" include the need to resolve a conflict among the circuits, the need to settle important federal questions in accordance with prior Supreme Court decisions and the need to have new federal issues decided by federal, not state, courts.<sup>8</sup> However, rule 19 does not mandate consideration of whether reversible error was committed in the lower court as a factor in the decision to grant certiorari. Thus, under its present application of rule 19, the Supreme Court may refuse to consider a case despite the likelihood that, if the case were considered on its merits, reversible error would be found.<sup>9</sup> In deciding whether certiorari should be granted, the Court has not recognized that confession of error cases may be amenable to the application of a standard less rigorous than that of rule 19, even though the probability of reversible error is obviously greater than in other cases.

Moreover, once certiorari has been granted in a case involving confession of error (presumably for other "special and important" reasons), the Court examines the record without recourse to the Solicitor General's particular representations to ascertain if reversible error was, in fact, committed.<sup>10</sup> As the Court stated in *Young v. United States*:<sup>11</sup>

The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight but our judicial obligations compel us to examine independently the errors confessed.<sup>12</sup>

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all petitions for certiorari are denied. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* § 4.2, at 149 (4th ed. 1969).

7. U.S. SUP. CT. R. 19(1).

8. U.S. SUP. CT. R. (19)(1)(b).

9. Such refusals may be inferred from repeated statements by the Court that denial of certiorari in no way reflects an opinion of the Court on the merits. See, e.g., *Agoston v. Pennsylvania*, 340 U.S. 844 (1950) (Frankfurter, J., concurring in the denial of cert.); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., concurring in the denial of cert.). See Vinson, *Work of the Federal Courts*, 69 S. Ct. v, vi (1949) (presented as an address to the A.B.A. by Chief Justice Vinson on Sept. 7, 1949: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions"); R. STERN & E. GRESSMAN, *supra* note 6, § 4.2, at 149-54. But see Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HAST. L.J. 131, 159-61 (1955).

10. See *Young v. United States*, 315 U.S. 257 (1942); *Howard v. United States*, 356 U.S. 25 (1958) (per curiam).

11. 315 U.S. 257 (1942). In *Young*, the petitioner had been convicted for violation of a federal narcotics statute. The Solicitor General confessed error, claiming that the District Court had misinterpreted the scope of the statute.

12. 315 U.S. at 258-59. Cases after *Young* indicate its continuing vitality. See,

Thus, cases in which error is confessed are treated the same as all other cases under rule 19, and, moreover, are not freed from the requirement of independent Supreme Court scrutiny on the merits where certiorari is granted.

It is the position of this Note that the Court should formulate a new policy to govern its review of confessed errors. Specifically, this Note proposes that in deciding whether to grant certiorari and whether to defer to the representations of the Solicitor General, the Supreme Court should distinguish between errors that are normally subject to judicial scrutiny (reviewable errors)<sup>13</sup> and errors of prosecutorial discretion that belong to a category of executive conduct not usually reviewed by the courts.<sup>14</sup> When reviewable errors are confessed, the Court should apply a standard more liberal than that of rule 19 in deciding whether certiorari should be granted. However, once the Court asserts jurisdiction, it should determine independently whether reversal is appropriate. In the context of errors of prosecutorial discretion, on the other hand, these issues must be treated differently, since it is generally agreed that the courts should not scrutinize the application of prosecutorial policies,<sup>15</sup> thus making the independent review standard inappropriate. One way of avoiding the problem of reviewing such policies is always to deny certiorari to confessed prosecutorial errors. However, this Note maintains that the Court instead should always grant certiorari in such cases and, consistent with the traditional rule of avoiding scrutiny of prosecutorial policies, should defer to the Solicitor General's determination of the appropriate disposition in all but a few extraordinary cases.<sup>16</sup>

The Solicitor General might confess to a wide range of errors properly subject to review by the judiciary,<sup>17</sup> the most common example being an error of law committed by a lower court. The error may be in the interpretation of a statute<sup>18</sup> or a prior holding of

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*e.g.*, *DeMarco v. United States*, 415 U.S. 449, 451 (1974) (Rehnquist, J., dissenting); *Casey v. United States*, 343 U.S. 808 (1952) (Douglas, J., dissenting); *Gibson v. United States*, 329 U.S. 338, 344 n.9 (1946). *Cf.* *United States ex rel. Marino v. Hoton*, 227 F.2d 886 (7th Cir. 1956) (confession of error by state attorney general).

13. *See* *Young v. United States*, 315 U.S. 257 (1942) (involving the misinterpretation of a federal statute).

14. *See* *Petite v. United States*, 361 U.S. 529, 533 (1960) (Brennan, J., dissenting) (citing *Young* as controlling in a case involving an error by the U.S. Attorney in prosecuting the defendant contrary to prosecutorial policy).

15. *See* *Newman v. United States*, 382 F.2d 479, 480 (1967).

16. Certainly a prosecutorial guideline that discriminated against racial minorities would require scrutiny on constitutional grounds.

17. Confession of error may also be proper in cases in which a change in circumstances warrants reconsideration of the case although there was technically no error below. *See, e.g.*, *Dyson v. Maryland*, 383 U.S. 106 (1966) (confession of error by a state attorney general).

18. *See, e.g.*, *Young v. United States*, 315 U.S. 257 (1942) (application of a federal anti-narcotics statute to practicing physician). A sharp distinction exists

the Supreme Court,<sup>19</sup> or in the application of common-law principles.<sup>20</sup> Another reviewable error committed by a lower court is the failure of a judge to disqualify himself from a case in violation of the Code of Judicial Conduct.<sup>21</sup> Such a case would normally be reviewable by the Supreme Court pursuant to its supervisory capacity over the federal judiciary.<sup>22</sup> A final example of an error normally subject to judicial review is the infringement of a defendant's constitutional rights by a law enforcement official, such as subjection of a defendant to illegal electronic surveillance following his indictment.<sup>23</sup>

The currently prevailing independent review standard of *Young* reflects the general rule that the Court will not be bound by the concurrence of the parties before it on a question of law.<sup>24</sup> There appears to be no persuasive reason for distinguishing confessions of reviewable error from other cases in which the Court has granted certiorari. In contrast, there is good reason to treat cases involving confessions of reviewable error differently than other petitions for certiorari.<sup>25</sup>

Rule 19 was promulgated to provide the Court with discretion over its caseload in order to enable it to meet its primary responsibility of deciding cases "whose resolution will have immediate importance far beyond the particular facts and parties involved."<sup>26</sup> It was

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between the Solicitor General's admission that a statute was incorrectly interpreted below and his admission that a statute is unconstitutional. See note 29 *infra*.

19. See, e.g., *Casey v. United States*, 343 U.S. 808 (1952) (interpretation of *Carroll v. United States*, 267 U.S. 132 (1924), in ruling a search and seizure not unreasonable).

20. See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960) (standard used to determine the competency of defendant to stand trial).

21. A.B.A. CODE OF JUDICIAL CONDUCT Canon 3C(1)(b) (1972). See, e.g., *Gay v. United States*, 411 U.S. 974 (1973) (Douglas, J., dissenting).

22. See, e.g., *Mallory v. United States*, 354 U.S. 449, 452-53 (1957); *McNabb v. United States*, 318 U.S. 332, 341 (1942); *Nardone v. United States*, 308 U.S. 338, 341-42 (1939).

23. See, e.g., *Hoffa v. United States*, 387 U.S. 231 (1967) (Solicitor General informed the Court of conversations taped after indictment); *Black v. United States*, 385 U.S. 26 (1966) (Solicitor General informed the Court of eavesdropping on petitioner's privileged communications with his attorney). Apparently, Solicitor General Marshall, concerned with possible illegalities in the government's use of surveillance, established a policy of total disclosure to the Court of any eavesdropping involved in a case. As a result, reversal was sometimes not even recommended to the Court. See R. STERN & E. GRESSMAN, *supra* note 6, § 5.12, at 225; Note, *supra* note 3, at 1470-71. See also *Leonard v. United States*, 378 U.S. 544 (1964) (error committed in selecting jury confessed by the Solicitor General apparently because of the infringement on defendant's constitutional rights).

24. See *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917).

25. In implementing the policy developed in this Note, the Court should not distinguish among types of reviewable errors.

26. Vinson, *supra* note 9, at vi. Writ of certiorari jurisdiction was first established by the Judiciary Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. It is now found at 28 U.S.C. § 1254 (1970). For a detailed legislative history, see F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 255-94 (1927). The discretion

necessary to allow the Court the opportunity to refuse to adjudicate many of the cases presented to it because of the overwhelming burden that accepting briefs, hearing oral arguments, and drafting full opinions on the merits in every case would present.<sup>27</sup> There would be little problem if the Court could, on the basis of the petition for certiorari alone, predict whether or not the lower court's decision was "clearly erroneous" and thereby appropriate for the nonburdensome procedure of summary disposition<sup>28</sup> following a granting of certiorari. However, in the majority of cases, the Court cannot determine the burden that individual cases or classes of cases will impose until after certiorari is already granted and the individual case is examined on its merits. Rule 19 thus provides a necessary screening device that allows the Court discretion without scrutiny of the merits.

In cases involving confessions of reviewable error, however, the Court can be confident that, if the Solicitor General properly exercises his authority, an egregious error has in fact been committed and that summary disposition is therefore appropriate.<sup>29</sup> In such cases, the

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inherent in certiorari jurisdiction was given form by the promulgation of U.S. SUP. CT. R. 19. See note 6 *supra*.

27. See Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975). "It is cases on the merits, say members of the Court, which take up most of their time. For various reasons, the consideration of applications for review—petitions for certiorari and jurisdictional statements on appeals—is not a very time-consuming task." *Id.* at 339-40.

28. See R. STERN & E. GRESSMAN, *supra* note 6, § 5.12, at 220; Gibbs, *supra* note 9, at 159. See generally Note, *The Supreme Court's Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 721-22 (1956).

29. See note 28 *supra*. No publicized policy exists as to when the Solicitor General may confess error. However, the Solicitor General should clearly not confess error unless firmly convinced that a serious mistake occurred in the lower court. Two considerations support such a policy. First, the Solicitor General's responsibility to act as an advocate for the government ordinarily entails defending successful lower court decisions before the Supreme Court. See generally Fahy, *supra* note 1; Werdegarr, *supra* note 1. Thus, the Solicitor General should not lightly suggest reversal of successful government prosecutions. Second, some commentators have expressed concern that the Court will be deprived of its full powers of review if the Solicitor General becomes a "tenth Justice." See Note, *supra* note 3, at 1473-74. To avoid such criticism, and to fulfill his responsibility, the Solicitor General should reserve confession of error for cases in which the error is obvious. See also Sobeloff, *supra* note 2, at 229, 230.

In cases involving the constitutionality of a statute, the Solicitor General should exercise greater caution before he confesses error than in cases that involve clear error in lower court proceedings. At least two considerations support this policy. First, if the Court declares an Act of Congress unconstitutional, the impact will be far broader than if it merely finds a clear error in prior proceedings. Second, some writers suggest that the Court should be reluctant to strike down statutes duly enacted by the elected representatives of the people. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

In practice, the alleged unconstitutionality of a statute has never been the basis for a confession of error. However, the Solicitor General should not adopt a policy prohibiting all such confessions. On occasion, the Court might benefit from the opinion of the executive branch on the constitutionality of a statute. See HART & WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 82 (2d ed. 1973)

"special reasons" standard of rule 19, predicated upon avoiding the anticipated burden of plenary adjudication, seems inapposite. Since the process of summary disposition imposes no significant burden on the Court beyond the inescapable one that certiorari consideration always entails, the Court does not benefit significantly by denying certiorari in confession of error cases. At the same time, however, the Government's adversaries in such cases might suffer irreparable injury if the Court denies certiorari and thus fails to rectify confessed errors.

Only in rare cases in which reviewable error is confessed is the Court likely to determine, after its independent examination of the record,<sup>30</sup> that no clear error has been committed.<sup>31</sup> Although such a case could arguably impose an unnecessary burden on the Court that might have been avoided through the application of rule 19, the mere potentiality of such an occasional burden should not deter the Court from granting certiorari and rectifying the confessed error in the vast majority of cases in which summary disposition will be found appropriate. Rather the Court can and should accommodate the countervailing interests of avoiding caseload burden and rectifying lower court errors by departing from its usual certiorari procedure and examining the merits of the confessed reviewable error as part of

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[hereinafter *FEDERAL COURTS*]; McClesky, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966).

At times the Court may wish to issue a complete opinion based on oral arguments even though there is no doubt that error was committed below. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123 (1968) (Court ignored the Solicitor General's confession of error and overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957)). Presumably this would be done because of the significance of the issue involved, and certiorari would be appropriate under rule 19 in any event. *See* note 6 *supra*. When the Court proceeds to set a case for oral arguments despite a confession of error, it must take steps to preserve the adversary stature of the parties. In some cases, officials within the Justice Department other than the Solicitor General may, in good faith, be able to argue the position opposing that of the petitioner. When this is not possible, the Court should always appoint an *amicus curiae*.

30. *See* text at notes 10-11 *supra*.

31. For example, the Court's examination might reveal that the Solicitor General was mistaken about the obviousness of the error or that he confessed error for reasons other than a belief that reversible error was clearly committed. *See* *Scott v. United States*, 374 U.S. 502 (1963) (confession of error to avoid confronting the Court with a constitutional issue); Note, *supra* note 3, at 1469.

Concern over the possibility of manipulative use of confession of error has been expressed by some members of the Court. *See, e.g.*, *Petite v. United States*, 361 U.S. 529, 532 (1960) (Warren, C.J., concurring); *Casey v. United States*, 343 U.S. 808, 809 (1952) (Douglas, J., dissenting). Yet the Court has also expressed a willingness to use an alternative ground prepared by the Solicitor General to dispose of a case. *See* *Petite v. United States*, 361 U.S. 529, 531 (1960) (Warren, C.J., concurring) (Court complied with the Solicitor General's request in order to abide by the "settled rule [of not anticipating] 'a question of constitutional law in advance of the necessity of deciding it'"). The altered certiorari standard that this Note proposes for cases in which reviewable error is confessed should not increase the Court's susceptibility to manipulation since the Court's responsibility to review the record independently remains the same.

the process of granting or denying certiorari.<sup>32</sup> Such a preliminary examination would permit the Court to ascertain whether the Solicitor General's characterization of the error is accurate. Only in the unusual case in which the Court's examination reveals that the confessed error is not egregious should it make its decision to grant certiorari in accordance with the standards or rule 19.<sup>33</sup> In all other confession of reviewable error cases, the Court should grant certiorari<sup>34</sup> and either summarily reverse or comply with the disposition

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32. For a discussion of the Court's present practice, see text at notes 6-9 *supra*. The Court's burden would not be significantly increased if it were also to consider whether reversible error was clearly committed during its examination of the record to see if special reasons exist to grant certiorari. Cf. *Griswold*, *supra* note 27, at 339-40. According to some commentators, the Court makes this inquiry to a limited extent in all cases. See *Gibbs*, *supra* note 9, at 159-61.

33. See note 6 *supra*. If the decision below was not clearly erroneous, more than summary disposition will be required. See R. STERN & E. GRESSMAN, *supra* note 6, § 5.12, at 220. Therefore, the decision whether to grant certiorari should be based upon the caseload considerations underlying rule 19 and not upon the Solicitor General's belief that certiorari is appropriate.

Certiorari may be appropriate even though the Court does not believe that error was committed below. The case in which both the Solicitor General and the petitioner mistakenly believe error was committed will likely present "special and important reasons" for review as required by rule 19. See note 6 *supra*. For a discussion of the preservation of the adversary nature of such a proceeding, see note 29 *supra*.

34. Some commentators suggest that irrespective of caseload concerns and the restrictions of rule 19, the Court should deny certiorari when the case at bar presents problems of ripeness or standing, or involves a political question. See, e.g., A. BICKEL, *supra* note 29, at 133-43 (1962) (account of *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961)). But see Gunther, *The Subtle Vices of the Passive Virtues—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 13-16 (1964). Insofar as these problems may arise when the Solicitor General confesses error, the policy of automatically granting certiorari in response to such confessions must be limited. Therefore, the question arises whether such problems are relevant in the confession of error context.

The ripeness doctrine states that "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 21.01, at 116 (1958). See, e.g., *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (hypothetical threat of harm held nonjusticiable). Challenges to criminal convictions do not present the Court with abstract issues, so problems of ripeness are not present when the Solicitor General confesses error.

Questions of standing will also not arise when the petitioner has been convicted of a crime. Standing requires that the litigant have a "sufficient personal interest" in the outcome of the adjudication to insure an adequate presentation of the issues involved. See *FEDERAL COURTS*, *supra* note 29, at 156. Undoubtedly, the convicted criminal defendant has such an interest.

A criminal defendant's petition for certiorari could, however, raise a political question that the Court should not adjudicate. The precise meaning of "political question" is unclear. Traditionally, political questions are those that involve matters delegated exclusively to the Congress or the executive branch by the Constitution. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1963). For a broader meaning of political question, see Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924). For a general discussion of the political question doctrine, see Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). However, political question problems



requested by the Solicitor General.<sup>35</sup>

The second type of error to which the Solicitor General may confess is an error involving prosecutorial discretion. Such errors occur when United States Attorneys prosecute in violation of the express<sup>36</sup> Justice Department guidelines<sup>37</sup> that are issued in the form of memoranda from the Attorney General.<sup>38</sup> In order to correct the error in such cases, the Solicitor General enlists the aid of the Court by requesting it to reverse or vacate and remand with leave for the government to dismiss the charges.<sup>39</sup>

Faced with confessions of prosecutorial errors, the Court must decide on two issues: whether to grant certiorari and, if it does grant certiorari, whether to dispose of the case in compliance with the Solicitor General's request. It is generally agreed that the Court should not review the validity or application of prosecutorial policies in any context,<sup>40</sup> both because the judiciary does not possess suffi-

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are not likely to arise in the confession of error context. Typically, the errors confessed are oversights of clearly established law. *See, e.g.,* *Martinez v. United States*, 380 U.S. 260 (1965) (failure to make finding as to constitutionality of a search). Therefore, in the usual confession of error case, the propriety of judicial determination is self-evident. If the Court discovers after the grant of certiorari that the case does involve a political question, it can dismiss the case on the grounds that certiorari was improvidently granted. *See* R. STERN & E. GRESSMAN, *supra* note 6, § 5.15, at 227.

35. On occasion the Court will disagree with the Solicitor General's requested disposition although it agrees that the decision below was clearly erroneous. *See, e.g.,* *Mesarosh v. United States*, 352 U.S. 1 (1956) (Court ordered a new trial rather than remanding for additional findings as suggested by the Solicitor General). Clearly, the Court's perception of the appropriate disposition should control.

36. This Note will consider only deviations from express Justice Department prosecutorial policy as "prosecutorial errors." Although violations of unexpressed policy are possible, they differ significantly from violations of express policy since their correction would not serve the same interest in the promotion of consistency, *see* text at note 53 *infra*, and would be more susceptible of misuse by the Solicitor General, *see* text at note 80 *infra*. Therefore, the Court, when dealing with deviations from unexpressed prosecutorial policy, should not follow the approach recommended in this Note.

37. *See, e.g.,* *Watts v. United States*, 422 U.S. 1032 (1975) (prosecution against express policy of not prosecuting individuals acquitted of an offense in state court arising from the same set of facts); *Redmond v. United States*, 384 U.S. 264 (1966) (prosecution against express policy limiting such prosecutions to aggravated offenses).

38. *See, e.g.,* N.Y. Times, April 6, 1959, at 19, col. 2 (late city ed.) (Attorney General Roger's memorandum forbidding on policy grounds federal prosecution following state prosecution for substantially the same acts).

39. *See, e.g.,* *Petite v. United States*, 361 U.S. 529 (1960).

40. *See, e.g.,* *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) (court refused to intervene when a United States Attorney accepted a guilty plea to reduced charges from one codefendant and refused to allow the same arrangement for the other codefendant); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965) (court recognized a strong interest in independently exercised discretion as protected by the doctrine of separation of powers and thus refused to review the exercise of prosecutorial discretion). The same factors that make judicial review of prosecutorial discretion inappropriate in the lower courts apply when questions of prosecutorial policy are presented to the Supreme Court.

cient expertise to evaluate such executive policies<sup>41</sup> and because judicial review might transgress the constitutional separation of powers.<sup>42</sup> This reasoning should prevail in cases where the Solicitor General confesses prosecutorial error and requests that the Court dispose of the case in a particular way. Once certiorari has been granted, anything more than a surface check as to the existence and constitutionality of the prosecutorial guideline<sup>43</sup> would lead the Court into precisely the kind of judicial review that it rejects for policy and constitutional reasons. It follows then that in a case involving confession of prosecutorial error, disposition along the lines suggested by the Solicitor General should be virtually automatic.

Recognition of the inappropriateness of independent judicial review of the merits of prosecutorial policies does not dispose of the other crucial issue in cases of confessed prosecutorial error: the circumstances under which the Court should grant certiorari in the first place. It does seem clear that if the Court exercises its discretion pursuant to rule 19 in cases involving confessed prosecutorial errors and reviews only selected cases, it is in effect examining Justice Department policy.<sup>44</sup> Thus, in order to differentiate among the petitions for certiorari, the Court would have to scrutinize either the nature of the policy violated or the severity of the breach of such policy.

To avoid deviation from the established principle that prosecutorial policies must be insulated from judicial review at any stage, the Court must choose between two alternatives: either always comply or never comply with the joint certiorari request of the petitioner and the Solicitor General. Adoption of a policy of always granting certiorari and then, in deference to prosecutorial discretion, automatically rectifying confessed deviations from express prosecutorial guide-

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41. See *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967): "[Questions of review of prosecutorial discretion are to be] resolved on the basis of the constitutional powers of the Executive. Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

42. See *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) ("Article II, Section 3 of the Constitution, provides that '[the President] shall take Care that the Laws [shall] be faithfully executed.' The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government"). *But cf.* Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 138 (1975).

43. See note 16 *supra*.

44. It is assumed that independent grounds sufficient for certiorari have not been asserted. If such grounds are asserted, the Court may grant certiorari irrespective of the Solicitor General's confession of error. However, even when an issue that warrants intervention has been presented, the Court may wish to dispose of the case on the basis suggested by the Solicitor General. See Note, *supra* note 3, at 1469.

lines will promote three important societal interests. First, the Solicitor General, in his role as representative for the prosecution on appeal, can act as a "buffer" between inflexible criminal statutes<sup>45</sup> and the public by implementing prosecutorial policies that are designed to protect society from legislative overcriminalization.<sup>46</sup> Strict enforcement of many criminal statutes results in injustice and weakens public confidence in the legal system.<sup>47</sup> By allowing the government to withdraw its complaint against defendants when Justice Department guidelines are violated, the Court will minimize a practice that undermines the fundamental purposes of the criminal justice system.

Second, the granting of certiorari in all cases involving confessed prosecutorial errors will enable the Department of Justice to allocate prudently its limited resources.<sup>48</sup> Although virtually all prosecutorial resources in a given case have already been expended by the time a petition for certiorari is filed with the Court,<sup>49</sup> substantial additional government expenditures (e.g., on incarceration) will be required if certiorari is not granted and the lower court conviction is not reversed.<sup>50</sup> Decisions affecting the allocation of correctional and other

45. See, e.g., *Hearings on the Nomination of Robert H. Jackson To Be an Associate Justice of the Supreme Court Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 54-55 (1941) (Attorney General Jackson's refusal to prosecute two individuals for libelling Senator Tydings although there appeared to be a violation of the letter of the law). See generally LaFave, *The Prosecutor's Discretion in The United States*, 18 AM. J. COMP. L. 532, 533 (1965).

46. This interest is usually promoted at the trial level. See LaFave, *supra* note 45, at 533-34; Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1301-02 (1965). See also Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 440-43 (1974). However, when this interest is not promoted at the trial level due to a deviation from prosecutorial guidelines, only correction of the deviation can prevent the inflexible application of the criminal laws. Thus, in *Redmond v. United States*, 384 U.S. 264 (1966), the Solicitor General enlisted the aid of the Court to remedy the mistaken prosecution of a married couple for sending obscene material to each other through the mail.

47. If prosecutors performed their responsibility "in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos." Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960).

48. See LaFave, *supra* note 45, at 533-34; Langbein, *supra* note 46, at 440-43. The resources of any prosecutor are necessarily limited, and the Justice Department is no exception. For example, the \$2 billion requested for the Justice Department for fiscal year 1975 was "the minimum necessary for the Department to carry out its responsibilities to administer the law fairly and equitably." *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1975, Hearings on H.R. 15404 Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 2d Sess., pt. 1, at 384-85 (1974) (testimony of Attorney General Saxbe).

49. See *Watts v. United States*, 422 U.S. 1032 (1975) (Burger, C.J., dissenting).

50. For example, if the defendant is incarcerated, the cost to the government of maintaining him in a federal penitentiary was estimated as of May 31, 1974, to be \$12 per day (or about \$4,300 per year). *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1975*,

post-conviction resources made at the appellate level<sup>51</sup> are no less significant than those made at the trial level<sup>52</sup> affecting the allocation of prosecutorial resources between major and petty offenses.

Finally, automatically granting certiorari in cases in which express Justice Department guidelines have been transgressed will encourage uniform implementation of prosecutorial policies. Because the exercise of unlimited discretion by prosecutors in initiating criminal proceedings gives rise to inconsistent and discriminatory law enforcement, prosecutors have been encouraged to establish specific guidelines to govern the commencement and conduct of criminal prosecutions.<sup>53</sup> In response to this concern over prosecutorial arbitrariness, the Attorney General has promulgated rules that delimit the scope of United States Attorneys' discretion in certain classes of cases.<sup>54</sup> Although the Attorney General may be able prospectively to enforce such prosecutorial rules by undertaking departmental disciplinary proceedings for deviation from Justice Department guidelines,<sup>55</sup> the policies underlying these guidelines cannot be fully effectuated unless the Court grants certiorari for confessed prosecutorial errors and remands with leave for the government to dismiss the charges.<sup>56</sup> Only if the Court complies with the Solicitor General's request can future prosecutorial inconsistencies be eliminated, since compliance

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*Hearings on H.R. 15404 Before a Subcomm. of the Senate Comm. on Appropriations*, 93d Cong., 2d Sess. pt. 1, at 543 (1974).

51. See 1973 ATTY. GEN. ANN. REP. 192 ("Overcrowding, with its attendant pressures, is one of the most serious problems faced by the Bureau of Prisons today").

Any government interest in allowing a prosecutor to apportion his resources according to the probability of success, see Langbein, *supra* note 46, at 440-43, has no relevance to the confession of error situation, since the prosecutor has already won in the lower courts.

52. See M. SCHWARTZ, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE* 14 (1961); LaFave, *supra* note 45, at 533-34; Note, *supra* note 46, at 1301.

53. See PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 133-34 (1967) (recognizing the interests in prosecutorial discretion but suggesting the establishment of definite procedures to minimize potential abuse).

Some have gone so far as to recommend that prosecutors be required to promulgate rules, much as agencies do, and that adherence to these rules should be enforced by the courts. See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

54. See, e.g., *Redmond v. United States*, 384 U.S. 264 (1966) (United States attorneys shall not prosecute for sending private, obscene material through the mail except in special circumstances); N.Y. Times, April 6, 1959, at 19, col. 2 (late city ed.).

55. See *Watts v. United States*, 422 U.S. 1032, 1036 (1975) (Burger, C.J., dissenting).

56. The Government has occasionally attempted to win on remand despite the Solicitor General's confession of error. See *United States v. Crest Fin. Co.*, 302 F.2d 568 (7th Cir. 1962) (denial of motion for an order to reinstate a judgment that had been vacated by the Court).

The Solicitor General should follow through on confessions of error and prohibit a second prosecution in order to guarantee, as far as possible, that the deviation from established policy is remedied.

would buttress the deterrent effect of prospective enforcement, at least in cases of willful deviations from departmental guidelines, by ensuring that no effect is given to convictions resulting from such deviations.<sup>57</sup> Furthermore, such a practice would ensure that no individual will suffer the effects of inconsistent, arbitrary or discriminatory imposition of legal process and sanctions, and would guarantee equal treatment at the hands of the government.

Despite these significant interests that the Supreme Court would promote by always granting certiorari in cases of confessed prosecutorial error, various justices have expressed several concerns that might discourage the Court from adopting such a policy. The remainder of this Note will examine the bases for these concerns and will demonstrate that they are not sufficiently serious to justify adopting the alternative policy of never granting certiorari.

One objection to a policy of automatically granting certiorari is that it might involve the Court in executive branch functions to a degree inconsistent with accepted notions of separation of powers. First of all, a policy of automatically granting certiorari might be perceived as excessive judicial involvement in the internal affairs of the Department of Justice. Chief Justice Burger, joined by two other present members of the Court, recently argued in dissent from the grant of certiorari in *Watts v. United States*<sup>58</sup> that "[t]he only purpose served by the Court's action in such cases is to aid the Government in emphasizing to its staff lawyers the need for a consistent internal administrative policy."<sup>59</sup> If the only effect of the Court's compliance with the Solicitor General's request in cases of confessed prosecutorial error was to facilitate the enforcement of departmental administrative policies, the Chief Justice's concern might be warranted.<sup>60</sup> In fact, however, the grant of certiorari in such cases serves an interest other than merely emphasizing to staff members the importance of executive policies. It also provides a remedy for defend-

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57. See Note, *supra* note 3, at 1471 ("Confessions of error demonstrate to the Court and the staff of the Justice Department that deviations from policy will not be permitted to succeed, and thus act as an internal control device").

The Court grants certiorari in order to advance important public interests rather than the interests of the individual petitioner. See S. REP. NO. 711, 75th Cong., 1st Sess. 39 (1937). However, when the Solicitor General confesses prosecutorial deviations from Justice Department guidelines, the interests of the petitioner should be an additional factor in support of the Court's uniformly granting certiorari. The rule against considering the interests of the petitioner rests in part on concern over the Court's caseload. This concern carries little weight in regard to confessions of error, which require only summary disposition. See *Griswold*, *supra* note 27, at 339-40. The petitioner's position also suggests the equitable consideration that, if prosecutorial guidelines had been followed, the case would never have been prosecuted.

58. 422 U.S. 1032 (1975).

59. 422 U.S. at 1035-36.

60. Cf. *Sullivan v. United States*, 348 U.S. 170, 172-74 (1954); *United States v. Hutul*, 416 F.2d 607, 626-27 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

ants who have been charged and convicted as a consequence of prosecutorial error. Therefore, the Court should not refuse to grant certiorari in confession of prosecutorial error cases solely because it considers matters of departmental administration an insufficient basis for judicial intervention.

Under a system of automatic granting of certiorari, a second basis for concern over separation of powers is whether the policy of not reviewing prosecutorial policies conflicts with the Court's perceived "judicial obligation," as articulated in *Young*,<sup>61</sup> to examine independently all errors asserted as the basis for certiorari. Although the Court has never explained how its "duty" to review should affect its response to confessions of nonreviewable prosecutorial errors, Chief Justice Burger discussed this issue in his *Watts* dissent.<sup>62</sup> He concluded that the Court's duty to review all confessed errors is unqualified<sup>63</sup> and urged that, to be consistent both with this duty and with the established practice of not reviewing prosecutorial policies,<sup>64</sup> the Court should not "blindly . . . accept the Government's belated analysis"<sup>65</sup> but rather should automatically deny certiorari in all cases in which prosecutorial error is confessed.

Although the dissent in *Watts* appropriately recognizes the distinction between reviewable and nonreviewable errors, its conclusion does not seem warranted. The Chief Justice appears to have relied upon the tenet that federal courts, and the Supreme Court in particular, should not "automatically conform [their] judgments to results allegedly dictated by a policy, however wise, which the judicial branch had no part in formulating."<sup>66</sup>

This tenet, however, is not inflexibly adhered to by the judiciary. Both at the trial and Supreme Court levels, there are instances in which the judiciary relies upon judgments of the executive branch as a basis for adjudication without reviewing the policy involved. One example of such reliance at the trial level is in cases in which the prosecutor, pursuant to rule 48(a) of the Federal Rules of Criminal Procedure, files for a voluntary dismissal of criminal charges.<sup>67</sup> Leave of court is required to effectuate the dismissal, but

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61. See *Young v. United States*, 315 U.S. 257, 258-59 (1942).

62. See 422 U.S. 1032 (1975). The Chief Justice was joined in his dissent by Justices White and Rehnquist.

In *Watts*, the Solicitor General confessed that the defendant was prosecuted contrary to an established Justice Department policy prescribing the prosecution of an individual following state prosecution for substantially the same act.

For another expression of the belief that errors asserted on petition must be reviewed even though based on executive policy, see *Petite v. United States*, 361 U.S. 529, 533 (1960) (Brennan, J., dissenting).

63. See 422 U.S. at 1036-37.

64. See text at notes 40-42 *supra*.

65. 422 U.S. at 1036.

66. 422 U.S. at 1036.

67. FED. R. CRIM. P. 48(a) provides: "The Attorney General or the United States

courts have construed their discretionary right to deny such leave so narrowly that dismissal upon prosecutorial request is almost automatic.<sup>68</sup> Thus, the courts aid the Justice Department in implementing prosecutorial decisions without reviewing underlying prosecutorial policy. Although this implementation of Justice Department policy is at the trial level, the issues confronting the district courts in rule 48(a) cases are not unlike those faced by the Supreme Court in cases of confessed prosecutorial error.<sup>69</sup>

Implementation of executive branch policies without review by the Supreme Court is exemplified by the "act of state" doctrine.<sup>70</sup> In applying this doctrine, the Supreme Court has reversed decisions in which the lower courts scrutinized the legality of the acts of foreign sovereigns recognized by the executive branch.<sup>71</sup> Because the Court considers it important not to interfere with the conduct of foreign policy, it restricts the scope of judicial inquiry in cases involving such foreign sovereigns.<sup>72</sup> The Supreme Court has indicated that the doctrine is founded neither upon the text of the Constitution nor upon principles of international law, but rather upon constitutional considerations of separation of powers.<sup>73</sup>

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attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

68. See *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975); 3 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 811-12 (1969).

69. For example, lower courts have based decisions not to review prosecutorial discretion on separation of powers theory. See *United States v. Cowan*, 524 F.2d 504, 512-13 (5th Cir. 1975).

There are, of course, procedural differences between dismissal at trial and dismissal at the Supreme Court. First, the Supreme Court may deny certiorari and refuse to hear the case at all; a trial court must either cooperate with the prosecutor and dismiss, or disagree with him and proceed. Second, it may be easier for the Supreme Court to proceed without the Solicitor General, see note 29 *supra*, than for the trial court to proceed without the prosecuting U.S. Attorney, see 3 C. WRIGHT & A. MILLER, *supra* note 68, § 812, at 305.

Such practical problems do not undermine the validity of the analogy between Supreme Court and trial court dismissals, however. In the first place, lower courts have not based their decisions to comply with prosecutorial requests for dismissal on such procedural grounds. See, e.g., *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961). In the second place, trial courts have avoided practical problems by such means as the appointment of a special prosecutor. See, e.g., *United States v. Cowan*, 396 F. Supp. 803 (N.D. Tex. 1974), *revd.*, 524 F.2d 504 (5th Cir. 1975).

70. For a general discussion of the act of state doctrine, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

71. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

72. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). In fact, members of the Court have even suggested that the executive branch can decide whether the Court should apply the "act of state" doctrine. See *First Natl. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972).

73. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-33 (1964). Specifically, *Sabbatino* held that the Court should refrain from analyzing the merits of an "act of state" even if the act violates international law. The impact of this

Despite the differing nature of the executive policies involved, the problem that confronts the Court in act of state cases is analogous to that presented in cases in which the Solicitor General confesses to prosecutorial error. In both situations, the Court is constrained from appraising executive policy because of the principles of separation of powers and because the implementation of executive policy without review promotes important values.

In light of these judicial practices, the reliance of the *Watts* dissent upon the premise that the judiciary is obligated in all cases to appraise independently executive policies before aiding in their implementation seems unwarranted. As the examples of rule 48(a) and the act of state doctrine demonstrate, the adoption of a policy by the Court that results in the implementation of executive policies without review by the judiciary is not unprecedented.

Nor would such a policy be inconsistent with the Court's emphasis in *Young* that judicial judgments "are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties."<sup>74</sup> This concern over precedent is warranted when the Court decides matters of substantive law, as in cases of confessed reviewable errors, since those decisions have precedential effect for all future cases, even those in which error is not confessed.<sup>75</sup> However, by granting certiorari and rectifying all confessions of prosecutorial error, the Court will not establish a precedent of substantive law, but rather will frame a specific policy that the judiciary should defer to the exercise of the Justice Department's discretion where established prosecutorial policies have been transgressed.<sup>76</sup> It follows that once the Supreme Court has been persuaded that the beneficial effects of rectifying prosecutorial error justify automatic granting of certiorari, it would undoubtedly want lower

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holding was limited by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1970). See *First Natl. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

74. *Young v. United States*, 315 U.S. 257, 259 (1942). Compare *Sibron v. New York*, 392 U.S. 40, 58 (1968), with *Casey v. United States*, 343 U.S. 808, 808 (1952).

75. There is some dispute over the precedential effect of any per curiam disposition by the Court. See Note, *supra* note 28, at 721-22. Such dispositions have been treated as less than binding precedent in light of the frequent difficulty in determining what the Court decided. See *id.* at 722; Note, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 282-84 (1959). However, some courts have given summary dispositions of the Supreme Court full precedential effect. See, e.g., *Mercado v. Rockefeller*, 502 F.2d 666, 673 (2d Cir. 1974); Case Note, 43 *FORDHAM L. REV.* 476 (1974). Thus, possible difficulties with the use of precedent in the context of confessed prosecutorial error cannot be overlooked.

76. The Court may be concerned that ambiguities in its summary decisions could lead lower courts to misinterpret and misapply its rulings, especially when the petitioner has asserted other errors in seeking the Court's intervention. See, e.g., *Watts v. United States*, 422 U.S. 1032 (1975) (Burger, C.J., dissenting) (violation of constitutional protection against double jeopardy asserted along with prosecutorial error). However, the Court can avoid this problem by specifying that its disposition is based on the prosecutorial error alone.



courts to rectify confessed prosecutorial errors at their level as well, in order to minimize the burden on the Court and to conserve the resources of defendants and the government.

A final objection to a policy of always granting certiorari in cases of confessed prosecutorial error is the potential for manipulation by the Solicitor General of confessions of error in cases in which no error has in fact been committed.<sup>77</sup> If the Court were to defer automatically to the Solicitor General's confession of prosecutorial error irrespective of a showing of deviation from an established and articulated Justice Department policy, it would confer upon him an absolute power to control the ultimate disposition of potentially all cases. Although the Solicitor General presumably would only confess error in order to rectify the injustice produced by an inadvertent prosecution,<sup>78</sup> automatic deference by the Court, without its even making certain that official guidelines exist, may enable him to employ confessions of error for other purposes.<sup>79</sup> This concern, however, should not affect the Court's choice between always and never granting certiorari. Since this Note recommends that the Court should grant certiorari and rectify the confessed error only in those cases in which a deviation from an established and articulated Justice Department policy is demonstrated,<sup>80</sup> there is little danger that the Solicitor General could manipulate the Court through ad hoc determinations of "error."

In conclusion, the significant interests advanced by always granting certiorari greatly outweigh the countervailing considerations of

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77. That the Solicitor General might confess error for reasons other than those explicitly stated in the Justice Department's memorandum has caused the Court concern in the past. See, e.g., *Petite v. United States*, 361 U.S. 529, 532 (1960) (Warren, C.J., concurring); *Casey v. United States*, 343 U.S. 808, 809 (1952) (Douglas, J., dissenting).

78. The Solicitor General usually is motivated by a sincere desire to avoid an injustice. See *Petite v. United States*, 361 U.S. 529 (1960) (Warren, C.J., concurring); Sobeloff, *supra* note 3, at 149.

79. Cf. note 31 *supra*.

80. The standard proposed by this Note restricts the discretion of the Court to grant certiorari and dispose summarily of confessions to prosecutorial error to a greater degree than rule 48(a) restricts the discretion of trial courts to accept a prosecutor's voluntary dismissal. The strictest interpretation of the "leave of court" requirement of rule 48(a) requires only "a statement of reasons and underlying factual basis [showing that] 'the reasons advanced for the proposed dismissal are substantial.'" *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973), quoting *United States v. Greater Blouse, Skirt & Neckwear Contractors Assn.*, 228 F. Supp. 483, 486 (S.D.N.Y. 1964). In contrast, this Note recommends that the Court automatically cooperate with the Solicitor General only if deviation from express Justice Department guidelines is established. Application of a fairly strict standard to a dismissal of charges by the Supreme Court is supported by valid policy considerations. Significant resources are committed to a prosecution and conviction before a case reaches the Court. See *Watts v. United States*, 422 U.S. 1032, 1036 (1975) (Burger, C.J., dissenting). Therefore, society has a strong interest that only important considerations be allowed to upset a conviction at so late a stage in the criminal process.

the precedential effect of such dispositions and the potential for misuse by the Solicitor General. While the appropriateness of judicial implementation of Justice Department policies is a legitimate concern, such a judicial role is not unprecedented. Therefore, the Court should adopt a policy of always granting certiorari and complying with the Solicitor General's requested disposition whenever he confesses to a deviation from established prosecutorial policy.